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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 229

STANLEY TAYLOR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

No opinion was filed by the District Court. The opinion of the Circuit Court of Appeals for the Ninth Circuit is not yet officially reported, but is set forth at pages 225 to 249 of the Record.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 26, 1944 (R. 250). A petition for rehearing was denied on June 2, 1944 (R. 251). A motion to dismiss the proceeding for lack of jurisdiction was denied on June 12, 1944 (Supplemental R. 43). The petition for a writ of certiorari was filed in this Court on July 5, 1944. Jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

STATUTE AND REGULATION INVOLVED

The case involves the Emergency Price Control Act of 1942 (56 Stat. 23, 50 U. S. C., Appendix, Supp. II, sec. 901 et seq.) and Maximum Rent Regulation No. 28 (7 Fed. Reg. 4913), issued pursuant to the Act. The pertinent sections of the Act and of the Regulation are set forth in the Appendix, *infra,* pp. 20–25.

QUESTIONS PRESENTED

1. Whether petitioner's conviction should be set aside because of his contention that he was deprived of an opportunity to defend upon the ground that Maximum Rent Regulation No. 28 was invalid upon its face, or because of his contention that the trial court lacked jurisdiction to proceed while his challenge in a separate proceeding to the validity of the Regulation was still pending.

2. Whether petitioner, who represented himself at the trial, validly consented to the completion of the trial before a jury of eleven members.

3. Whether Maximum Rent Regulation No. 28 is sufficiently clear and specific to satisfy the requirements of due process of law.

4. Whether the trial court erred in not holding that petitioner's apartments had been changed by a major capital improvement, in instructing

the jury that the apartments were not changed from furnished to unfurnished by an agreement for the sale of the furnishings, and in holding that Section 205 (f) (2) of the Act and Section 1388.1805 (d) of the Regulation did not apply.

STATEMENT

The information against the petitioner in the District Court contained 21 counts. The first 20 counts (R. 2–40) charged the petitioner with violating Sections 4 (a) and 205 (b) of the Emergency Price Control Act in October and November 1942, by willfully demanding and receiving higher rentals for specific apartments in a building owned by him in San Francisco than were permitted by Maximum Rent Regulation No. 28, applicable to the San Francisco Bay Defense Rental Area. The 21st count (R. 40–41) charged the petitioner with having violated the same sections and Section 4 (b) of the Act by attempting to evict a tenant in violation of the Regulation. The petitioner was acquitted on the 21st count (R. 208). Three of the remaining counts were dismissed on motion of the United States Attorney (R. 84), and petitioner was convicted on 17 counts (R. 207). He was sentenced to imprisonment for a term of 6 months on each count, the sentences being made to run concurrently, and to pay fines aggregating $950 (R. 209–210). The Circuit Court of Appeals affirmed the judgment.

Subject to exceptions not here material, the Regulation fixed the maximum rent that might lawfully be demanded or received for any housing accommodations within the Defense Rental Area at the rent charged on March 1, 1942, unless between March 1, 1942 and July 1, 1942, the effective date of the Regulation, the housing accommodations were changed from fully furnished to unfurnished, or from unfurnished to fully furnished, or were changed by a major capital improvement as distinguished from ordinary repair, in which event the maximum rent was fixed at the first rent charged after the change.

Petitioner does not dispute that the tenants of the respective apartments were charged the sums stated in the information for the use and occupancy of the apartments, including the furniture and furnishings, during the periods alleged, or that these sums were in excess of the rentals for the same facilities on March 1, 1942. He contended, however, and now maintains he believed in good faith, (a) that a major capital improvement had been made in the apartments between March 1, 1942, and July 1, 1942, and (b) that the apartments had been changed from fully furnished to unfurnished by virtue of an agreement for the sale of the furnishings which petitioner and his wife made on June 6, 1942, with Mrs. Evelyn Flynn, the manager of the apartment The rents which were charged in the transactions

alleged in the information are not shown to have exceeded the first rents charged after the alleged changes had taken place.

The alleged capital improvements consisted of the addition of a washing machine for the use of occupants of 48 apartments in the same building, at a cost of $300 and expenses of installation (R. 94, 177), and the claimed renovation of eight of the 20 apartments covered by the counts of the information relating to rentals. Testimony concerning the extent and dates of renovative work conflicted, the tenants of four of the eight apartments stating that none had been done[1] (R. 46, 47, 59–60, 76–77, 78, 98, 149, 150, 179). The trial court left it to the jury to determine whether any of the apartments had been changed by major capital improvements between March 1 and July 1, 1942 (R. 190).

Under the terms of the agreement relating to the sale of the furnishings[2] (R. 86–93) petitioner and his wife purported to sell them in place to Mrs. Flynn, "subject to the payment of the full purchase price" of $15,000, only $1.00 of which was paid upon the execution of the contract (R. 87). It was agreed that the balance of the purchase price should be payable only out of charges

[1] The tenant of one apartment testified that that apartment had been completely renovated three or four months before the trial which began on January 6, 1943 (R. 59–60).

[2] The agreement consisted of a contract of sale dated June 6, 1942, and a supplementary agreement dated July 31, 1942.

collected from the tenants for the use of the furnishings, and "that all such charges * * * shall be turned over to the sellers as collected until the purchase price has been paid in full" (R. 88). The contract further provided that the furnishings should not be moved from the building in which the apartments were located until all of the purchase price was paid; that the purchaser should "so utilize and use and maintain said furniture and furnishings, as to promote and secure the rental of the apartments" (R. 87); that the contract should "not be transferable or assignable by the purchaser unless the written consent of the sellers is first obtained" (R. 89); that if it should appear to the sellers "that their interests are not properly protected or served" and the purchaser then fail to pay the unpaid balance of the purchase price within 90 days after notice, the sellers should have "the right to cancel this agreement and to recover full possession" of the furnishings; and that upon full payment of the purchase price the sellers should "deliver to said Evelyn Flynn a good and clear title to all of said furnishings and furniture" (R. 92).

Following this transaction, the tenants paid rentals consisting of separate charges for the apartments and for the furnishings, the totals of which were greater than the rentals on March 1, 1942 (R. 93–98, 179–180). It is not disputed that none of the furniture or furnishings was removed from the apartments.

The trial court instructed the jury that it was immaterial whether or not there was a bona fide sale of the furnishings, so far as concerned the defendant's right to charge rentals in excess of those charged for the same accommodations on March 1, 1942, and that, if the apartments as rented remained fully furnished, the maximum rentals fixed by Maximum Rent Regulation No. 28 were those charged on March 1, 1942 (R. 190).

At the trial the petitioner contended that Section 1388.1805 (d) of Maximum Rent Regulation No. 28 (Appendix, *infra,* p. 24) was applicable and that it was error for the court to refuse so to instruct the jury (R. 195–197). This section provides that if the rent on the date determining the maximum rent or any other fact necessary to the determination of the maximum rent is in dispute between the landlord and the tenant, or is in doubt, the Administrator on petition of the landlord within 30 days of the effective date of the Regulation, or on his own initiative, may enter an order fixing the maximum rent. Evidence introduced by the petitioner includes correspondence between him and the Office of Price Administration in San Francisco, which he apparently construed as a request for a ruling with regard to the effect of the transaction with Mrs. Flynn relating to the furnishings (R. 103–115). Included in this correspondence is a letter, signed by the Senior Rent Attorney in that office, replying to one from

the petitioner dated August 8, 1942, in which it is stated that "under the circumstances outlined above, the March 1, 1942 rent would be the maximum rent for the apartment, including the furniture. Your statement that the furniture was sold to Mrs. Flynn prior to July 1, 1942, would not affect this situation" (R. 108–109). The petitioner testified that he remembered this letter (R. 179).

The petitioner further contended (R. 195–198) that Section 205 (f) (2) of the Emergency Price Control Act (Appendix, *infra*, p. 23) applied to this case. That section provides that a warning notice shall be sent to an alleged violator of the provisions of a license issued under "this subsection" of the Act, before revocation proceedings may be instituted.

A jury of 12 was impaneled to try the case. On the morning of the third day of the trial, a roll call showed that one juror was absent. It developed that he was unavoidably detained and, at quarter past ten, the court inquired as follows (R. 95):

> Mr. Taylor, with your consent, and with the consent of the United States Attorney, may the cause be tried by eleven jurors?

Both the petitioner and the United States Attorney replied in the affirmative. The trial thereupon proceeded to a verdict before a jury of eleven members. The petitioner represented himself throughout the trial (R. 43, 181, 208).

At the time of the trial a suit filed by the petitioner in the Emergency Court of Appeals pursuant to Section 204 (a) of the Act, to procure a review of the action of the Price Administrator on September 28, 1942 in denying a protest which he had filed, challenging the validity of the Emergency Price Control Act and of Maximum Rent Regulation No. 28, was still pending (R. 121–122). Before the appeal in the present case was heard by the Circuit Court of Appeals, the Emergency Court of Appeals sustained the Administrator's denial of petitioner's protest (*Taylor* v. *Brown*, 137 F. (2d) 654), and this Court denied a petition for certiorari to review the decision of the Emergency Court of Appeals (320 U. S. 787).

ARGUMENT

I

This case does not present either the question of whether "one charged with criminal violation of a duly promulgated price regulation may defend on the ground that the regulation is unconstitutional on its face" or the question of whether "one who is forced to trial and convicted of violation of a regulation, while diligently seeking determination of its validity by the statutory procedure may thus be deprived of the defense that the regulation is invalid", which were reserved in *Yakus* v. *United States*, 321 U. S. 414, 446–447.

Maximum Rent Regulation No. 28 obviously

could not be challenged as invalid upon its face in the sense intended by this Court in the *Yakus* case. Petitioner's own attack upon it, in *Taylor* v. *Brown, supra,* was based upon its allegedly unconstitutional effects. This case, therefore, does not present the first question which petitioner seeks to raise. The validity of the Regulation has in any event now been determined.

At the trial, in the course of a lengthy recital of his previous dealings with the Office of Price Administration, petitioner introduced in evidence a copy of his complaint in the Emergency Court of Appeals, seeking to review the Administrator's denial of his protest directed to the validity of the Regulation (R. 123–147). He raised the question of the trial court's alleged lack of jurisdiction to proceed with the present case while the proceeding in the Emergency Court of Appeals was pending, by a motion to the Circuit Court of Appeals to dismiss the present proceeding and discharge the defendant, filed June 12, 1944, and denied on the same day (Supplemental R. 43). The Circuit Court of Appeals had rendered its opinion in this case on April 26, 1944 (R. 224), after the decision of the Emergency Court of Appeals sustaining the denial of petitioner's protest, which was rendered July 15, 1943. 137 F. (2d) 654. Petitioner's motion was grounded partly upon Section 204 (d) of the Emergency Price Control Act (Appendix, *infra*, p. 21). He makes the same contention here (Pet. 12).

Section 204 (d) of the Act is obviously intended to deprive any court, other than the Emergency Court of Appeals, of authority to entertain objections to the validity of a regulation of the Administrator, not of authority to enforce such a regulation. The trial court was required to assume the validity of the regulation, as it did; and the constitutionality of this requirement has been sustained by this Court in the *Yakus* case. The most that can be said on the basis of the procedural point which was reserved in the *Yakus* opinion is that, at the trial, a continuance might have been justified in order to await a final decision by the Emergency Court of Appeals with respect to the validity of the Regulation, although this is by no means a necessary inference. Petitioner is not entitled to have his conviction set aside for reasons which have lost all force. As matters have developed, he has suffered no harm as a result of the sequence of events but has had his full day in court upon his challenge to the validity of the Regulation. He will suffer punishment, if his conviction stands, only as a result of a proper trial for violation of a regulation which has been found to be valid in all respects in a proceeding which he himself brought.[3] It would

[3] Regulations identical with the instant regulation (except as to the effective date and the base rent date) were also sustained by the Emergency Court of Appeals in *Wilson* v. *Brown*, 137 F. (2d) 348, and *Avant* v. *Bowles*, 139 F. (2d) 702. The regulation involved in the *Avant* case was also before this Court in *Bowles* v. *Willingham*, 321 U. S. 503.

now be an idle gesture to remand the case to the District Court to permit the petitioner to offer a defense which is foreclosed by the decision in *Taylor* v. *Brown, supra.*

II

Petitioner gave valid consent to the completion of the trial before a jury of 11 members and was not deprived of his constitutional right to jury trial. He now claims that, as a layman representing himself, he should have been specifically informed that a refusal on his part to consent would result in a mistrial. He was, however, asked whether the cause "may be tried by eleven jurors." No other inference was possible than that a refusal to consent would halt the trial. As the record reflects throughout, petitioner was an aggressive defender of his own interest at the trial. He had elected to represent himself after his counsel withdrew (R. 208) and was treated with especial consideration on that account (R. 181). He was not under any disability or handicap but was, rather, the "shrewd and experienced" layman whom this Court has recently held to be competent to waive trial by jury altogether in a prosecution for serious crime. *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 278. In the circumstances of the present case there were both "the exercise of a free and intelligent choice" and

"the considered approval of the court," which this Court has held to be essential to a valid waiver (*idem*, p. 275). The trial, moreover, was for an offense involving a maximum punishment of imprisonment for one year or a fine of not more than $5,000, or both (Section 205 (b) of the Emergency Price Control Act, Appendix, *infra*, p. 22), and not for a felony. As the court below concluded (R. 244), "although the right of an accused to a trial by a constitutional jury must be jealously safeguarded by the court throughout," the defendant "intelligently and freely consented to the trial's continuing to termination by less than 12 jurors" and there was "no error in failure of the trial judge to inform the defendant of the eventuality of a mistrial unless he elected to proceed with the trial by the 11 jurors."

III

The other reasons urged by petitioner for granting certiorari are plainly without merit. In substance, they are (1) that the Regulation is so vague as to violate the requirements of due process and (2) that the court erred in not holding that the apartments had been changed by a major capital improvement between March 1, 1942 and July 1, 1942; in instructing the jury as a matter of law that the agreement for the sale of the furnishings did not have the effect of changing the apartments from furnished to unfurnished; and in

holding that Section 205 (f) (2) of the Act and Section 1388.1805 (d) of the Regulation were without application to the case.

Petitioner's assertion that the Regulation is so vague and uncertain as to violate the requirements of due process is an attack upon its validity which can only be made by following the procedure prescribed by Sections 203 and 204 of the Act. It is clear in any event that there is no merit in the contention. Petitioner points out that under the Regulation the maximum rent which might be charged for housing accommodations depended in certain circumstances on whether they had been changed by a major capital improvement between March 1, 1942, and July 1, 1942, and that minds may differ as to what constitutes a major capital improvement in close cases. Therefore, he maintains, one subject to the Regulation was made to speculate at the peril of possible imprisonment regarding the rent he might lawfully charge. But, as Mr. Justice Holmes said in *Nash* v. *United States*, 229 U. S. 373, 377, "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or short imprisonment, as here; he may incur the penalty of death."

Moreover, Section 205 (b) of the Act (Appendix, *infra*, p. 22), as the trial court carefully

instructed the jury (R. 187–188), prescribes criminal sanctions only for willful violations. If a landlord subject to Maximum Rent Regulation No. 28 reasonably and in good faith believed that housing accommodations which he owned had been changed by a major capital improvement between March 1, 1942, and July 1, 1942, he could not be convicted because of having charged rents not exceeding the first rents charged after the change in the accommodations. On no construction, therefore, could the provisions of the Regulation become a trap for those who acted in good faith. The principle enunciated in *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, and the other cases relied upon by petitioner, therefore, has no application to this case. The verdict of the jury settles the question of the petitioner's knowledge that he was violating the Regulation.

The jury decided adversely to the petitioner with regard to his contention that a major capital improvement had been made, and its verdict is amply supported by the evidence. The installation of a washing machine for the use of tenants of 48 apartments, at relatively slight expense, while conceivably a capital improvement, was obviously not a *major* capital improvement; and the renovation of a few apartments in a large building, even if it took place, falls clearly in the category of maintenance and repair rather than in that of

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major capital improvements. *Gale Realty Corporation* v. *Bowles,* 139 F. (2d) 496 (Em. Ct. App.).

Petitioner's claim that the apartments had been changed prior to July 1, 1942, from fully furnished to unfurnished by virtue of the agreement with Mrs. Evelyn Flynn, manager of the apartments, and that the court erred in instructing the jury to the contrary is likewise not sustainable.

Under the laws of California the contract, particularly in view of its provisions for the transfer of title upon payment of the purchase price and for the cancellation of the contract and the retaking of possession by the sellers in case they should decide that their interests were not being properly protected, was merely an executory contract to sell and did not have the effect of transferring ownership of the furniture to the purchaser. *Beaudry* v. *Peterson,* 50 Cal. App. (2d) 478, 123 P. 2d 108, 124 P. 2d 637; *Peronnet* v. *Ralph,* 112 Cal. App. 97, 296 Pac. 329; *Bailly* v. *Loock,* 103 Cal. App. 220, 284 Pac. 235.

Even if the contract had the effect of transferring ownership of the furnishings, the result would still be the same. The Act (Sec. 302 (f) and (g)) and the Regulation (Sec. 1388.1813 (6) and (10)) define the term "housing accommodations" as "any building, structure, or part thereof, or land appurtenant thereto, or any other real

or personal property rented or offered for rent for living or dwelling purposes * * * together with all privileges, services, furnishings, furniture, and facilities connected with the use or occupancy of such property" and the term "rent" as "the consideration demanded or received in connection with the use or occupancy or the transfer of a lease of any housing accommodations." Despite the change of ownership of the furnishings, if a change of ownership had been effected, the furniture was "connected with the use or occupancy" of the apartments and under the Regulation was a part of the housing accommodations. The tenants after the alleged change of ownership as before were renting furnished apartments and the amounts paid for the apartments and the furnishings constituted rent for housing accommodations which could not validly be increased above the sums charged on March 1, 1942. As the court below states (R. 233), the agreement was in the nature of a device to circumvent the Regulation. It appears to have been a violation of Section 1388.1809 of the Regulation (Appendix, *infra*, p. 25), although not separately charged as such.

Whether the agreement had the effect of changing the apartments from furnished to unfurnished was a question of law. The court, therefore, did not usurp the functions of the jury in instructing that the agreement did not have the effect which petitioner claimed it had.

It is evident from a mere reading of Section 205 (f) (2) of the Act (Appendix, *infra,* p. 23) and Section 1388.1805 (d) of the Regulation (Appendix, *infra,* p. 24) that these sections have no application to the facts of this case. The former deals solely with the procedure for revocation of licenses to sell commodities. *United States* v. *Charney,* 50 F. Supp. 581 (D. C. Mass.); *United States* v. *Ganz,* 48 F. Supp. 323 (D. C. Mass.). The latter provides for the administrative determination of the amount of rent on the date determining a maximum rent, or "any other fact" upon which a maximum rent depends, if either is in dispute or is doubtful or not known, upon the Administrator's own initiative or "on petition of the landlord filed within 30 days after the effective date" of the Regulation. Petitioner filed no such petition and the letter which he did write at a later time was answered (*supra,* p. 7). The question which he raised, moreover, was not a question of fact coming within the quoted paragraph of the Regulation.

CONCLUSION

The decision of the court below is clearly right, is not in conflict with any decision of this Court or of any other Circuit Court of Appeals, and does not involve any important question of Fed-

eral law which has not been, but should be, determined by this Court. We respectfully submit, therefore, that the petition should be denied.

CHARLES FAHY,
Solicitor General.

THOMAS I. EMERSON,
Deputy Administrator,
FLEMING JAMES, JR.,
DAVID LONDON,
Office of Price Administration.

AUGUST 1944.